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Supreme Court of the United States

October Term, 1975
No. 75-846

JACK C. HUNTER, MAYOR,
CITY OF YOUNGSTOWN, OHIO *et al.*,
Petitioners,

vs.

FRATERNAL ORDER OF POLICE
YOUNGSTOWN LODGE NO. 28, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

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TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

1. There is no constitutional prohibition under the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States against a municipality requiring its employees to be residents thereof 7
2. No office is held in this country as the result of contract or grant, nor does such person have a vested interest or right of property in such job 9

Conclusion 10

Appendix A1

Opinion of the Court of Appeals A1

Journal Entry of the Court of Appeals A51

Judgment of the Supreme Court of Ohio Dismissing the Appeal A53

Judgment of the Supreme Court of Ohio Overruling Motion to Certify A54

Order of the Supreme Court of Ohio Denying Rehearing A54

TABLE OF AUTHORITIES

Cases

Abeyta v. Town of Taos, 499 F.2d 323 9
Ahern v. Murphy, 457 F.2d 363 7
Detroit Police Officers Association v. City of Detroit, 190 N.W.2d 97, *dismissed for want of a substantial federal question*, 405 U.S. 950 ..... 7, 8
Ector v. City of Torrence, 514 P.2d 433, *cert. den.* 42 L.W. 3470 8
Salt Lake City Firefighters Local 1645 v. Salt Lake City, 449 P.2d 239, *cert. den.* 395 U.S. 906 8
Shapiro v. Thompson, 394 U.S. 618 8

Constitution and Statutes

Constitution of the United States:

Article I, Section 10 ..... 3, 6, 9
Fifth Amendment 3, 6, 7
Fourteenth Amendment 3, 4, 7

28 U.S.C. Section 1257 (3) 2

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To the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Jack C. Hunter, Mayor, City of Youngstown, Ohio, and Paul Kechler, Otis Coney, Sr. and Alice Orosz, individually and as members of the Civil Service Commission of Youngstown, and the Civil Service Commission, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio, which judgment became final on October 16, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Judgment Entry of the Mahoning County Court of Common Pleas is officially reported and is cited as Fraternal Order of Police Etc. v. Hunter, 303 N.E.2d 103.

The Opinion and Judgment of the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio are not officially reported and are printed in the Appendix herein.

The judgment of the Supreme Court of Ohio dismissing the appeal, unreported, is printed in the Appendix herein.

The judgment of the Supreme Court of Ohio overruling the motion to certify, unreported, is printed in the Appendix herein.

The order of the Supreme Court of Ohio denying rehearing, unreported, is printed in the Appendix herein.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio was entered on June 16, 1975. The Supreme Court of Ohio overruled petitioners' Motion to Certify the Record on September 26, 1975. The Order of the Supreme Court denying petitioners' Motion for Rehearing was made and entered on October 16, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether there is a constitutional prohibition under the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States against a municipality requiring its employees to be residents thereof?

2. Whether the enactment of a residency rule by a municipality violates Article I, Section 10, of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, to the Constitution of the United States provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or in naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to taken for public use without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 15, 1923, the City of Youngstown adopted what has come to be known as the Youngstown Home Rule Charter. R. 3 (Joint Exhibit 1). Pursuant to that adoption and the powers granted thereunder, on January 31, 1928, the Council of the City of Youngstown duly enacted an ordinance which required that all employees of the City of Youngstown reside within the city limits in order to maintain their positions. R. 15-16.

The Youngstown Civil Service Commission has for at least forty years, required all applicants for a position in the classified service to present proof in the form of an affidavit, that said applicant has resided in the City of Youngstown for at least one year preceding the making of application for a position in the classified service. R. 4 (Joint Exhibit 3).

The Common Pleas Court of Mahoning County, Ohio, had previously ruled that the above ordinance was invalid with regard to any employee in the classified service in the City of Youngstown. That Court further held that the only body that could properly promulgate rules and regulations governing classified personnel in the City of Youngstown is the Youngstown Civil Service Commission, and City Council, therefore, had no jurisdiction in the matter. R. 16-18.

Pursuant to that decision, the Youngstown Civil Service Commission, on January 20, 1972, duly promulgated a rule which makes residency in the City of Youngstown mandatory, as a condition of employment and continued employment with the City, for all employees in the classified service. R. 19-20 (Joint Exhibit 7). It was decided that a one year period of time would be granted within which any employee who for any reason was not residing within the city could comply with said Civil Service Rule.

All personnel in the classified service were notified both of the Civil Service Rule and the one year grace period which was to run until January 20, 1973. R. 20.

In the year 1959, while working for the City of Youngstown as a classified employee at the Youngstown Municipal Airport, respondent Carmen Agnone moved outside the city limits of the City of Youngstown in violation of the above ordinance forbidding him to do so. R. 39. Mr. Agnone did not advise the City of Youngstown that he had moved until the year 1970 or 1971, and on January 20, 1973 the City of Youngstown determined that he had failed to comply with the Civil Service Rule of January 20, 1972. R. 57. Thus, on January 20, 1973, the City of Youngstown dismissed respondent Carmen Agnone from his position for failure to comply with said rule and regulation. R. 20 (Joint Exhibit 5).

Respondent Carmen Agnone filed a complaint seeking to have the court declare the rights of civil service employees with regard to the residency rule duly promulgated by the Youngstown Civil Service Commission. The respondent Fraternal Order of Police joined in this cause with Mr. Agnone.

At the close of testimony and presentment of evidence, the Trial Court held that the residency rule was unconstitutional in that it operates as an impairment of contract as well as operating retrospectively in violation of Article I, Section 10, of the United States Constitution, and that said rule also violates the Fifth Amendment of the Constitution of the United States in that it deprives classified employees of their right to travel freely.

It was from this decision that the petitioners appealed to the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio. On June 16, 1975, the Court of Appeals, for reasons more fully explained in its Opinion, affirmed the Trial Court.

The petitioners then appealed said judgment of the Court of Appeals to the Supreme Court of Ohio who dismissed the appeal and refused to review said case. On October 16, 1975 petitioners' timely filed motion for rehearing was denied by said court.

REASONS FOR GRANTING THE WRIT

1. There is no constitutional prohibition under the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States against a municipality requiring its employees to be residents thereof.

This case presents a question of public and great general interest. Now more than ever, the movement for new residency law is gathering strength.

The validity of municipal employee residency requirements has been affirmed by various federal and state courts, as well as the United States Supreme Court.

The case of *Detroit Police Officers Association v. City of Detroit*, 190 N.W.2d 97 (1971), was dismissed for want of a substantial federal question by the United States Supreme Court, 405 U.S. 950. The Michigan Supreme Court had held that a Detroit ordinance requiring residence of police officers, similar to the Youngstown ordinance and rule, did not violate the equal protection clause of the Fourteenth Amendment, either per se or as applied to the waiver provisions of the ordinance.

The Chicago residence requirement was upheld by the Seventh Circuit Court of Appeals in *Ahern v. Murphy*, 457 F.2d 363 (1972). That Court held that the United States Supreme Court's prior dismissal for want of federal question of the aforementioned Detroit case was dispositive of the appeal attacking the constitutional sufficiency of the Chicago ordinance and rule of the city police department. The Court held that a denial of certiorari carried no precedential weight; however, a dismissal for want of substantial federal question is a decision on the merits of the case appealed. The Court added that dismissal for want of a sub-

stantial federal question in a state court is fully equivalent to affirmance on the merits in an appeal from a federal court insofar as the federal questions under 28 U.S.C. Section 1257 (1) and (2) are concerned.

In relying on *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court of Appeals failed to distinguish between types of residency requirements. Where a *durational* period of residence is a condition precedent to employment, it may be a violation of the right to travel; but where it is a *continuing* condition subsequent to employment, it is *not* a violation of the right to travel.

Three times since its decision in the *Shapiro* case, the United States Supreme Court has refused to reverse State Supreme Court decisions which specifically upheld the constitutionality of municipal employee residency requirements. During its 1969-1970 session, only twenty-eight days after it rendered its decision in *Shapiro*, the Supreme Court denied certiorari in the case of *Salt Lake City Firefighters Local 1645 v. Salt Lake City*, 449 P.2d 239, *cert. den.* 395 U.S. 906 (1969). See also *Ector v. City of Torrence*, 514 P.2d 433, *cert. den.* 42 L.W. 3470; and *Detroit Police Officers Association v. City of Detroit*, 405 U.S. 950 (1972).

A close analysis of the United States Supreme Court decisions on the issues raised in this case demonstrates that such cases proscribe restrictions on *interstate travel* and not *intra-state employment*. The Court of Appeals erred in believing that *Shapiro* overruled *Salt Lake City Firefighters Local 1645 v. Salt Lake City* (*supra*).

Since the instant case does not involve any right that has been judicially determined to be fundamental, the "rational relationship" or "reasonable basis" test rather than the "compelling interest" test is applicable. It is erroneous to conclude that a statute or ordinance requiring

as a condition to continued employment is equitable with an employee's right to travel and, consequently, that it must be tested under the compelling interest standard.

A pronouncement by the Supreme Court of the United States is necessary to provide the proper guidelines for the State Courts to follow. It is important that a measure of uniformity and stability be infused into this area of broadly expanding law affecting great numbers of citizens.

2. No office is held in this country as the result of contract or grant, nor does such person have a vested interest or right of property in such job.

Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation imposing a new duty, or attaches a new disability in respect to past transactions or considerations, must be deemed retrospective, and in violation of Article I, Section 10, of the United States Constitution.

A statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation.

No office is held in this country as the result of contract or grant, nor does such person have a vested interest or right of property in such job. The only right which attaches to an employee or office in the public sector, is the right to the protection by civil service statutes, both state and municipal. There are no vested property rights in a civil service position or non-classified position. There is no contract contemplated by the laws of this state and country that could be impaired by a residency rule. See *Abeyta v. Town of Taos*, 499 F.2d 323 (1974).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO

(Dated April 16, 1975)

Case No. 73 C.A. 24

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

FRATERNAL ORDER OF POLICE
YOUNGSTOWN LODGE NO. 28, *et al*,
Plaintiffs-Appellees,

vs

JACK C. HUNTER, MAYOR,
CITY OF YOUNGSTOWN, *et al*,
Defendants-Appellants.

OPINION

* * * * *

TOPIC INDEX

Constitutional law—Municipalities—Civil Service Commission—R. C. 733.68 does not apply to police officers—Municipal ordinances may not conflict with Municipal Charter—Authority of Police Chief—Retroactive application of Civil Service Commission rule, not proper, when—Residency requirements—Compelling Governmental Interest test.

DONOFRIO, *J.*

This is an appeal by the defendants, Jack C. Hunter, Mayor, City of Youngstown, and the Youngstown Civil Service Commission, hereinafter referred to as appellants.

Plaintiffs-appellees, Carmen Agnone, a maintenance employee of the Youngstown Municipal Airport in the classified service of the City of Youngstown, and the Fraternal Order of Police Lodge #28 filed a complaint seeking to have the court declare the rights of Civil Service employees with regard to the new rule promulgated by the Youngstown Civil Service Commission, Rule IV, Section 9 (F), and further asking the court to issue a temporary restraining order from removing from employment any employee who has failed to execute an affidavit regarding his residence; and for a second cause of action, praying for a declaratory judgment as to appellees' rights and duties as to residency under the applicable laws of the state and rules and regulations of the Youngstown Civil Service Commission; and for a finding and declaratory judgment that the rule of a Civil Service Commission requiring residency of a tenured Civil Service employee is invalid.

After a hearing on the temporary restraining order, the temporary restraining order was granted, and on April 11, 1973, the matter was brought to trial before the court.

The rule at issue, which was adopted January 20, 1972, provides as follows:

> "Any officer or employee not residing within the city limits of Youngstown, except as otherwise provided in Rule IV, Section 5, is subject to dismissal from service of the city."

The trial court found that there being no rule as to residency prior to January 20, 1972, those employees of

the City of Youngstown who entered the classified service prior to January 20, 1972, were not required by the rule of the Youngstown Civil Service Commission to maintain residency in the City of Youngstown; and, therefore, said rule was not enforceable against any employee entering the classified service prior to January 20, 1972.

The court also found that the rule was unconstitutional and void for the reason that it was retroactive in its operation, and further found that the constitutionality of the rule depended on whether or not it was a reasonable rule, and that any regulation which serves to restrict the exercise of a constitutional right of freedom of movement across frontiers, unless shown to promote a compelling governmental interest, is unconstitutional. The court found that the defendants did not produce any evidence of any kind from which the court could determine the reasonableness of the rule, and that since no evidence was produced to support the reasonableness of the rule, the court said that the burden of the defendants was not sustained in showing the compelling governmental interest that required a classified employee to be a resident of the City of Youngstown as opposed to his right to exercise his choice of place to live. The court found in the absence of any evidence, that under the constitution of the United States, the rule attempting to be enforced was an unconstitutional interference with the rights of the employees and ordered that Rule IV, Section 9 (F) of the Civil Service Commission is unconstitutional and void for the following reasons:

"1. It is retroactive in its operation.

"2. It is unreasonable because it violates the rights of the individual guaranteed by the Fifth Amendment of the Constitution of the United States."

It is from this holding and order of the trial court that appellants bring this appeal.

Appellants assign five errors, the first of which states as follows:

"The trial court erred in finding that Section 733.68, Ohio Revised Code, does not apply to a police officer."

The pertinent part of Section 733.68, Revised Code, states as follows:

". . . each officer of a municipal corporation, . . . shall be an elector of the municipal corporation * * *."

At the trial below, the appellants argued that a police officer was an officer of the municipal corporation, and, therefore, must be an elector of that municipal corporation. The court was correct in rejecting the appellants' argument.

An examination of R. C. Section 733.68 indicates that the term "officer" as used in that section denotes elected officials and appointees other than police officers. In *State v. Byomin,* 106 Ohio App. 393, the court, regarding R. C. 733.68, stated at page 397 as follows:

"We do not believe this section applies to police officers of a village or to a deputy marshal. The officer designated in this section refers to others than police officers, * * *."

We find no error in the court's ruling regarding appellants' first assignment of error, and this assignment of error is, therefore overruled.

Appellants' second assignment of error states as follows:

"The trial court erred in its finding that Youngstown Revised Code of Ordinances, Section 32.04 has no ap-

plication to the issue at bar notwithstanding its former decision in Kissos et al v. City of Youngstown, et al."

The thrust of appellants' second assignment of error is that the court erred in the instant case in construing Youngstown Revised Code of Ordinances Section 32.04 as being in conflict with the rules of the Civil Service Commission of the City of Youngstown; and further, appellants' contention is that the Youngstown City Council has the power and authority to require residency as a condition of employment and provide dismissal for the failure to comply with residency requirements. This question was previously adjudicated by the trial court in another case known as *Kissos, et al v. City of Youngstown,* Mahoning County Common Pleas Court Case No. 195308. In the *Kissos* case and the instant case, the court's reasoning as to the City Ordinance conflicting with the Civil Service rule and its authorities for such reasoning are as follows: The lower court held that the Youngstown City Charter precludes City Council from prescribing qualifications for employment and grounds for termination of employment.

Section 52 of the Youngstown Charter provides in pertinent part as follows:

> "All of the provisions of the Revised Code of the State of Ohio relating to Municipal Civil Service are hereby adopted and made a part of this Charter, * * *."

The citizenry of Youngstown, by approving that provision, expressed a desire to adopt the state civil service laws. It is well-settled that when a municipal charter adopts by general reference the state laws on any subject, the laws become a part of the charter.

In *Reed v. City of Youngstown,* 173 Ohio St. 265, the syllabus states as follows:

"1. Because of section 52 of the Youngstown charter, the general statutes of the state relating to municipal civil service, as existing at any particular time, represent a part of the Youngstown charter at that time even though those statutes may be identified as parts of the Revised Code.

"2. No ordinance can conflict with the provisions of a city charter and be effective.

"3. An ordinance requiring retirement of classified civil service employees of a city at 65 years of age conflicts with provisions in a city charter to the effect that the tenure of every employee in the classified service of a city *shall be during good behavior and efficient service.*" (Emphasis added).

In *State, ex rel. Gerhardt, v. Krehbiel* (1974), 38 Ohio St. 2d 90, the syllabus states as follows:

"Where a municipal charter prescribes the manner for removal of municipal officers, any attempt by the municipality's legislative body to remove an officer in a manner at variance or in conflict with the charter's directives is a nullity."

Appellees point out that the state statute governing the tenure of civil service employees provides that tenure shall be "during good behavior and efficient service". Significantly, this does not mandate a residency requirement. The Youngstown City Charter adopted the state statute in regard to Civil Service Employees, thus permits only the Civil Service Commission to provide for rules and regulations that govern tenure and termination of employment. Appellee points out that there is no significant difference between an ordinance which fixes a mandatory retirement age and one which imposes residency requirements. Each

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improperly attempts to add another condition for which a civil servant can be terminated. Each attempts to add a third qualifier to the statutory "during good behavior and efficient service"; consequently, each conflicts with R. C. Section 143.27 as adopted in the Youngstown City Charter.

We hold that the trial court properly concluded that the Youngstown City Ordinance imposing residency was in conflict with the City Charter and was consequently invalid. Appellants' second assignment of error is overruled.

Defendants' third assignment of error is that "the trial court erred in finding that Ohio Revised Code, Section 737.06 has no application to the issue at bar and that all rules and regulations promulgated by Youngstown Chiefs of Police, past and present, are wholly without authority".

This assignment of error refers to the following language in the trial court's journal entry:

> "Section 48 of the Charter of the City of Youngstown fixes the powers of the 'Department of Police'.
>
> " 'The Chief of Police shall be the head of the Department of Police and shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employees constituting the police force.'
>
> "* * *
>
> "The powers of the Chief of Police are set out in the above section of the Charter, and other than those powers so granted by the Charter, the Chief of Police has no other powers. (State v. Cleveland, 164 Ohio St. 437).
>
> "Therefore, the 'Lyden Rule', 'Allen Rule', 'Cress Rule', and 'Terlesky Rule', were promulgated by the Chief of Police wholly without authority.

"The only body which is authorized to pass rules for classified employees of the City is the Civil Service Commission."

At the time of trial there was no specific rule or regulation by the Youngstown Chief of Police as to residency of policemen.

The current Police Manual, which was issued under Chief John Terlesky, does not contain any rule or regulation as to the residency of policemen because the International Chiefs of Police Organization, which compiled the current Police Manual, was opposed to any restriction as to residency of policemen (R. 95-97, D.X. 4).

In the preface of the current Police Manual appears the following:

"All rules and regulations issued prior to the publication of this book are hereby declared null and void." (Page 5)

Therefore, we find that the rules and regulations in prior Youngstown Police Manuals contained in D.X. 1, Rule 76, page 21; D.X. 2, Rule 72, page 26; and D.X. 3, Rule 72, page 26, which required members of the police force to reside in the City of Youngstown were repealed after Police Manual D.X. 4 went into effect.

Since the evidence clearly established that the current Police Manual contains no specific residency rule (R. 95-97), the plain implication of the trial court's decision is that the trial court either held that the Youngstown Chief of Police has no authority to promulgate rules or regulations or at least seriously questions such authority on the part of the Youngstown Chief of Police. This raises a serious question as to the administration of the Youngs-

town Police Department by the Chief of Police that needs clarification by this Court.

The Youngstown Home Rule Charter was adopted pursuant to R. C. 705.71, et seq., which is referred to as the "Federal Plan" and is a "Strong-Mayor" form of government.

The pertinent parts of the Youngstown Home Rule Charter are as follows:

> "Section 1. . . . The City of Youngstown, . . . shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio; and all such powers, whether expressed or implied, shall be exercised and enforced in the manner prescribed by this Charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the Council. *In the absence of such provisions as to any power, such power shall be exercised in the manner now or hereafter prescribed by the general laws of the State, applicable to municipalities.* (Emphasis added).
>
> "Section 2. The enumeration of particular powers by this Charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the City shall have, and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this Charter specifically to enumerate.
>
> "Section 3. The executive and administrative powers of the City shall be vested in the Mayor, heads of Departments and other officers provided for in this Charter.

"Section 4. The Mayor shall be the chief executive officer of the City. * * * He shall appoint and may remove the heads of all Departments, except as otherwise provided in this Charter. * * *."

Section 21 provides that the Mayor shall appoint a Chief of the Police Department. This section also provides as follows:

"The Director or Chief of each Department shall have the supervision and control of the Department, the disposition and performance of its business, and the custody and preservation of the books, records, papers and property of the Department."

Section 48 provides as follows:

"Section 48. The Chief of Police shall be the head of the Department of Police and shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employees constituting the police force." (Joint Exhibit No. 1).

It is clear from the language of the Youngstown Home Rule Charter that the Chief of Police is granted the authority to administer the Department of Police with the same power prescribed by the general laws of Ohio. Therefore, we hold that R. C. 737.06 is applicable to the Youngstown Chief of Police. Even if this was not true, in our opinion the Youngstown Home Rule Charter either expressly or by implication grants the Chief of Police the same power that R. C. 737.06 does.

The language of the first paragraph of Section 48 of the Youngstown Home Rule Charter is similar to R. C. 737.06 except for the following language at the end of R. C. 737.06: "* * * under such general rules and regulations as the director of public safety prescribes".

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In *Harsney v. Allen, Jr.*, Chief of Department of Police, City of Youngstown, 160 Ohio St. 36, the court, on page 40, stated as follows:

> "There is no office of director of public safety under the provisions of Youngstown's City charter, and the duties pertaining to such office are performed by the chief of police as the 'head of the Department of Police.'
>
> "Under Sections 3 and 7, Article XVIII of the Ohio Constitution, municipalities have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws, and any municipality may frame and adopt or amend a charter for its government and exercise thereunder all powers of local self-government."

We hold that under the express provisions of the Youngstown Home Rule Charter, Civil Services Statutes of Ohio, and the logical implication therefrom, the Youngstown Chief of Police has the power to make rules and regulations concerning the administration, supervision and discipline of the Department of Police. This power is similar to that referred to in R. C. 737.06 and R. C. 737.13 for the director of public safety.

By this discussion, we do not mean to imply that police chiefs have power to pass regulations or promulgate orders relative to residency requirements for policemen and other employees of the police department. The same reasoning applied to the attempt by City Council to legislate rules for the Civil Service Commission as to residency that was in conflict with the City Charter would apply to an attempt by the police chief to pass specific

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rules as to residency requirement. The extent and limitation of the Police Chief's power to promulgate rules and regulations is therefore governed by the Charter, State Statutes, and state statutes governing civil service employees.

For the foregoing reasons, we hold that defendant's third assignment of error has merit and it is, therefore, sustained.

Passing over the appellants' fourth assignment momentarily, since this assignment is the heart of the instant case, we come now to appellants' fifth assignment of error, which states as follows:

> "The trial court erred in overruling appellants' motion to dismiss plaintiff-appellee, Fraternal Order of Police, Youngstown Lodge No. 28, as a party to this action."

Appellants contend that the trial court should not have permitted the Fraternal Order of Police to participate in this litigation. They contend that the association does not have an interest in the proceedings and should not be allowed declaratory relief. This assignment of error is without merit. 16 Ohio Jurisprudence 2d, Declaratory Judgments, Section 5, pages 583-584, states as follows:

> "In other words, the basic purpose of the act is to relieve parties from acting at their peril in order to establish their legal rights."

"The basic purpose of the (declaratory judgment) act is to relieve parties from acting at their peril in order to establish their legal rights". We find that the Fraternal Order of Police Association was a proper party in the court below; and we, therefore, overrule appellants' fifth assignment of error.

Appellants' fourth assignment of error, which poses the most difficult question, states as follows:

> "The trial court erred in its finding that Rule IV, Section 9 (F) duly promulgated by the Youngstown Civil Service Commission is void and unconstitutional."

The trial court in addressing itself to the question formulated by this assignment of error posed two issues to be decided:

> "1. Is Rule IV, Section 9 (F), adopted Jan. 20, 1972 operative as against civil service employees who entered the classified service of the City prior to Jan. 20, 1972, that being the date of adoption of said Rule.
>
> "2. Does the Rule violate the due process clause of the Fifth Amendment of the United States Constitution."

The first issue brought forth the question of the retroactive application of Rule IV, Section 9 (F); and the second issue brought forth the question of constitutionality of the rule.

The City of Youngstown and its employees are in a unique situation relative to the question of residency requirement. As discussed previously herein, the City of Youngstown had no valid residency requirement because of the conflict with the City Charter and the lack of power of the Police Chief to promulgate such a requirement so that the question arising in relationship to retroactivity is unique only to the instant case under its facts.

The trial court's opinion as to the issue of retroactivity of the Civil Service Commission's rule was as follows:

"Coming now to consider the first of said issues, certain constitutional provisions and limitations must be considered.

"Article II, Section 28, (1851) Constitution of Ohio provides as follows:

" 'The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts * * *.'

"The words, 'retrospective' and 'retroactive', as applies to laws are synonymous. Very early in our history, Justice Story, in the case of Society for the Propagation of the Gospel v. Wheeler, et al, (1814) 22 Fed. Cases, Page 756, Case No. 13156, reported by 2 Gall 105, defined the term, 'retrospective'.

"In that case, the Constitution of New Hampshire came into question. In the 23rd Article of the Bill of Rights of that Constitution is the following declaration:

" 'Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made either for the decision of civil causes or the punishment of offenses.'

"Justice Storey defined 'retrospective' as follows:

" 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective, and this doctrine seems fully supported by the authorities.'

"The Supreme Court of Ohio, and its lower courts, have consistently followed the definition of Justice

Storey. (Rairden v. Holden, 15 O. S. 207 @ 210; Miller v. Hixson, 64 O. S. 39; Sylvania Buses v. Toledo, 118 O. S. 187 @ 198; Wheatley v. A. I. Root Co., 147 O. S. 127, Syl. 2).

"It has been held that a retroactive enactment, extinguishing a vested legal relationship, would amount to deprivation of property without due process of law, and thus violates the 14th Amendment of the Constitution of the United States. (Euclid v. Zangerle, 145 O. S. 433).

"The Supreme Court of Ohio succinctly defined 'retroactive' laws as follows:

" 'A statute which creates a new obligation in respect to transactions or considerations already past is violative of Article II, Section 28 of the State Constitution, which forbids the enactment of retroactive laws by the general assembly.' (Safford, Supt. of Ins. v. Metropolitan Life Ins., 119 O. S. 333 (1928)).

"The foregoing interpretation of the term 'retroactive' or 'retrospective' has been followed, generally, in the United States. (Neild v. District of Columbia, 110 F. 2d 246, 254; State ex rel. James v. Mills, Del. Ct. in Banc, 57 A. 2d 99, 102; London Guarantee & Accident Co. v. Pittman, 25 S. E. 2d 60, 65, 66; Wilson v. Greer, 151 P. 629, 632).

"A retroactive statute not only violates the Constitution of Ohio, but also violates Article I, Section 10, of the United States Constitution, which is as follows:

" 'No state shall . . . pass . . . law impairing the obligation of contracts * * *.'

"The above limitation upon the states by the Federal Constitution applies to municipal ordinances and ad-

ministrative regulations having the force and operation of statutes. (221 U. S. 400; 21 U.S. 403 @ 411; 115 U. S. 674; 172 U. S. 1; 202 U. S. 453; 232 U. S. 548; Cuyahoga River Power Co. v. City of Akron, 240 U. S. 462 (1916).)."

The trial court noted that the rule as to residency by the Civil Service Commission prior to the adoption of Rule IV, Section 9 (F) on January 20, 1972, was Rule No. 7, which states as follows:

"Applicants must be citizens of the United States. For positions in the City service, applicants must have resided in the City of Youngstown at least one year last past."

The trial court concluded that Rule No. 7 was the only valid rule in force as to the residency for the classified employees of the City of Youngstown; and it held that those employees who entered the classified service of the City of Youngstown prior to January 20, 1972, were not required by the rules of the Civil Service Commission to maintain a residence in the City of Youngstown. The Court further held that the said rule was not enforceable against any employee entering service before January 20, 1972.

We hold that the attempted enforcement of said rule by the Civil Service Commission against employees hired prior to January 20, 1972, was retroactive in operation, and find that the trial court ruled correctly on this issue.

We come now to the constitutionality of Rule IV, Section 9 (F) enforcing a residency requirement upon classified employees of the City of Youngstown with the alternative of facing termination of employment if the employee does not comply.

The appellants' argument in this regard is that there is no vested right of a city employee to employment, and that said rule is reasonable and it is the proper function of the Civil Service Commission to promulgate such a rule, and that it does not unreasonably deprive appellees of liberty or property; and that such a residency requirement has been determined to be both reasonable and necessary for the preservation of the municipality.

We note that there is a division of authority as to a government body's power to promulgate residency requirement rules. This division of authority develops oftentimes from the unique situation of the particular facts of cases being decided and also because of the tests applied by the courts in their reasoning as to the validity or invalidity of such rules. For example, the United States District Court for the Northern District of Ohio, Western Division, case of *James E. Fugate, et al., v. The City of Toledo, et al.,* Case No. 73-251, decided in 1974, but unreported. The *Fugate* case had before it the question of residency requirements of the members of the City of Toledo Police Department and Fire Department. The court chose to us the test as to the validity of the charter provision of the city of Toledo requiring residency, known as the "rational basis" test, and upheld the requirement of residency, on the basis that the rule showed a rational relationship to a valid state purpose. There are other cases, the majority of which deal with safety forces, police and firemen, that do not use a standard to follow to determine the validity of ordinances and civil service rules as to residency other than whether or not the municipality or civil service commission has the power to so regulate. The cases that hold that the municipality or the civil service commission has the right to regulate by providing residency requirements are as follows:

Detroit Police Officers Association v. City of Detroit, 190 N. W. 2d 97, and *Hattiesburg Firefighters Local 184, et al. v. City of Hattiesburg,* 263 So. 2d 767. The Detroit Police Officer case and the Hattiesburg Firefighters case do not refer to a test or standard to be applied in determining the constitutionality of ordinances or regulations relative to residency requirements.

Another case that permits residency requirements, *Ector v. City of Torrance,* 109 Cal. Rptr. 849, held a statute in California prohibiting residency requirements for city employees was not applicable to a charter city, and that a charter provision requiring residency was not unconstitutional.

In *Abrahams v. Civil Service Commission,* 319 A. 2d 483, the Supreme Court of New Jersey held that the right to live outside of city boundaries was subordinate to rational policy to restrict employment to residents. In the *Abrahams* case the strong dissent interprets *Shapiro* and *Maricopa County, infra,* (United States Supreme Court cases) as controlling, and uses the "compelling governmental interest" standard. Other courts used the test of "compelling governmental interest" standard.

We do not have guidance from our Ohio Supreme Court, since no cases were found by this Court, nor were any brought to our attention by the litigants herein. There is an Ohio case from the court of appeals level, *Quigley v. Blanchester,* 16 Ohio App. 2d 104, that holds:

> "A municipal ordinance which requires members of the police department to reside in or within two miles of the municipality is a reasonable exercise of the police power of such municipality and is not violative of the Ohio Constitution."

This case deals with a non-charter village, and some facts therein are at variance with the instant case. Furthermore, this case does not give an adequate disposition of the question of retroactivity.

The cases using the "compelling governmental interest test" have made a determination as to the interest that the employees have in their employment and that there was a consitutional right involved and that any infringement on this right must be first shown by the state to be of compelling governmental interest in order for the infringement to be upheld. The "compelling interest standard" test is more strict in interpreting the constitutional validity of these statutes or rules than the "rational basis" test.

In *Donnelly v. City of Manchester,* 274 A. 2d 789, New Hampshire Supreme Court (1971) the court in paragraphs 4, 7 and 8 of the syllabus held:

> "4. Right of every citizen to live where he chooses and to travel freely not only within state but across its borders is fundamental right guaranteed both by state and federal Constitutions.
>
> "7. Fact that there was no constitutional right to work for city did not mean that granting of privilege of working for city could be conditioned upon surrender of fundamental constitutional right of citizen to live where he chooses.
>
> "8. Discrimination against some in public employment can no longer be practiced on basis that the employment is a privilege which can be withheld from all."

The Court continued on page 791:

"The right of every citizen to live where he chooses and to travel freely not only within the state but across its borders is a fundamental right which is guaranteed both by our own and the Federal Constitutions. Ratti v. Hinsdale Raceway, 109 N. H. 270, 249 A. 2d 859 (1969); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969)."

In *Hanson v. Unified School District*, 364 F. Supp. 330 (1973), headnotes one through five state:

"1. School teachers alleging that regulation of school district requiring that teachers in district reside in county in which district was located constituted state action infringing upon their constitutional rights stated cause of action cognizable under Civil Rights Act. 42 U.S.C.A. Section 1983; U.S.C.A. Const. Amend. 14.

"2. When called upon to decide whether law or regulation denies equal protection, court looks to character of classification in question, individual interests affected by classification, and government interests asserted in support of classification. U.S.C.A. Const. Amend. 14.

"3. Right to work for living in common occupations of community is secured by Fourteenth Amendment. U.S.C.A. Const. Amend. 14.

"4. Availability of governmental benefit, such as employment, may not be made to depend upon whether benefit is characterized as 'right' or as 'privilege'. U.S.C.A. Const. Amend. 14.

"5. Teachers, by signing contracts with school district containing provisions that they must live

within county where school district was located, did not voluntarily waive their right to exercise constitutional rights to live and work where they chose. U.S.C.A. Const. Amend. 14."

The cases that referred to the test to be used as the compelling governmental interest test followed the U. S. Supreme Court case of *Shapiro v. Thompson,* 394 U. S. 618, in which paragraph five of the syllabus states:

"5. In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." (Emphasis added).

Shapiro struck down durational residency requirements as being discriminatory and unconstitutional, but indicated that not all durational requirements would be unconstitutional if the state could show the compelling governmental interest to infringe upon the freedom of travel of the individual.

In *Memorial Hospital v. Maricopa County,* 415 U. S. 250, 39 L. Ed. 2d 306, Headnote 1 states:

"1. A state statute requiring a year's residence in a county as a condition to an indigent's receiving non-emergency hospitalization or medical care at the county's expense is repugnant to the equal protection clause, since such a durational residency requirement creates an invidious classification that impinges on the right of interstate travel by denying basic necessities of life to newcomers where the state fails to show a compelling state interest in such a classification nor demonstrates that in pursuing legitimate objectives, it has chosen means which do not unnecessarily impinge on constitutionally protected interests."

A thorough discussion of this matter is found in the case of *Krzewinski v. Kugler, Jr.*, 338 Fed. Supp. 492. This was a United States District Court case involving a New Jersey statute providing for residency requirements. The following statement is from page 497:

> "Recently, however, the Supreme Court has made fairly clear that when the differentiation adversely affects other fundamental constitutional rights, the test to be applied is much more stringent. The statute may be upheld only if the state is able to demonstrate a compelling interest in maintaining the difference in treatment between the classes. Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971); Shapiro v. Thompson, 394 U. S. 618, 634, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); Sherbert v. Verner, 374 U. S. 398, 405, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); Bates v. City of Little Rock, 361 U. S. 516, 524, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960)."

In its determination as to the police and firemen residency requirements, the court used the stringent test of "compelling governmental interest". However in Krzewinski the court found from evidence in the record that it was sufficiently demonstrated by the state of New Jersey that there was a compelling governmental interest in requiring the police and firemen to adhere to a residency requirement and upheld the New Jersey statute. In applying the stringent compelling governmental interest test, the *Krzewinski* case relied on the *Shapiro* case and on page 498 explained the interest that government employees have in their jobs as follows:

> " 'It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.' King v. New

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Rochelle, supra 442 F. 2d at 648 (footnote omitted). The soundness of this conclusion is even more apparent when it is considered together with the refusal of the Supreme Court in Shapiro to link the right to travel with any specific clause of the Constitution, commerce or otherwise. Shapiro v. Thompson, supra 394 U. S. at 730, n. 8, 89 S. Ct. 1322. See Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)."

We find that the better test to be used in determining the instant case is that of the "compelling governmental interest" as in the *Krzewinski* case. We now look to the instant case to determine what evidence the Civil Service Commission produced to support a compelling governmental interest theory, and find there is absolutely nothing in the record to sustain this position. We note this was the finding of the trial court in its reference to the record where, on page 8 of its judgment entry the trial court stated:

"It has been determined that any classification which serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a 'compelling' governmental interest, is unconstitutional. (Shapiro v. Thompson, 394 U. S. 618 @ 634).

The Court on page 9 of its judgment entry further stated:

"The defendants produced no evidence of any kind from which the Court could determine the reasonableness of this Rule. Reasonableness is a matter of fact, and must be proved by evidence. No evidence having been produced to support the reasonableness of said Rule, the Court must assume that the reasonableness of said Rule could not be sustained by the defendants.

> There must be some relationship between the work required of a classified employee, and the necessity of his being a resident of the City of Youngstown in order to do that work. The City or the Civil Service Commission has produced no evidence on this issue.
>
> "The Court, therefore, finds, in the absence of any evidence which should have been produced on the issue, that under the Constitution of the United States, the Rule sought to be enforced is an unconstitutional interference with the rights of an individual."

Even though the Civil Service Commission did not produce evidence in the record as to "compelling governmental interest" regarding the policemen residency requirement, we must be realistic as to the question of whether or not a residency requirement for policemen will meet the strict test of compelling governmental interest, and we find that the lower court could have taken judicial notice of the nature and type of duties evolving around a policeman. The job of a policeman has distinguishing characteristics from all other city employees as was stated in *Detroit Police Officers Association v. City of Detroit*, 190 N. W. 2d 97 at 98:

> "There is a special relationship between the community policed and a policeman. A policeman's very presence, whether actually performing a specified duty during assigned hours, or engaged in any other activity during off-duty hours, provides a trained person immediately available for enforcement purposes.
>
> "Policemen are required by department order to be armed at all times, and why is this? Simply because by such requirement they are, no matter where they are or what they are doing, immediately prepared to perform their duties. They are charged with law en-

forcement in the city of Detroit, and obviously must be physically present to perform their duties. The police force is a semi-military organization subject at all times to immediate mobilization, which distinguishes this type of employment from every other in the classified service."

We, therefore, hold that as to police officers, the lower court erred in its ruling that the residency requirement by the Civil Service Commission was unconstitutional as to policemen who were hired after the passage of the Civil Service Commission's Rule IV, Section 9 (F), on January 20, 1972. We, therefore, sustain appellants' fourth assignment of error only to the extent that it declares the Civil Service Commission Rule unconstitutional as applied to policemen hired after January 20, 1972. Since we hold that by taking judicial notice of the duties of policemen we find that there is a "compelling governmental interest" that makes the rule by the Civil Service Commission constitutional as it applies only after its effective date of passage.

We have taken judicial notice that there is a compelling reason to require safety personnel to reside within proximity to their duty station. At the same time, we apparently have exempted a major portion of the police force from the application of the Civil Service Residency requirement of January 20, 1972. The judicial exemption is not a wholesale release. There is statutory recognition that a policeman or fireman beyond his or her normal work may be called upon for "emergency special duty assignments". (R. C. Section 737.07). The very word "emergency" connotes an unseen situation but one demanding reasonably immediate attention. Each policeman or fireman is required as part of his or her duties to be reasonably available to execute duties in such "emergency". The

execution of these emergency duties is not a geographical measurement but rather a reasonably timely performance. The Youngstown Safety Forces certainly have enough experience whereby it could be reasonably determined, timewise, as to how soon a member of the police or fire department should answer an "emergency assignment". The promulgation of this time factor as a rule or regulation would insure proper protection for the City and at the same time protect against abuses and misunderstanding. Enforcement would arise out of R. C. Section 737.12, as a "reasonable and just cause".

Concluding then, that every citizen has a fundamental right to live where he chooses in addition to the right to travel freely within the state and across its borders, protected by our Federal Constitution, a residency requirement imposed by a municipality or Civil Service Commission on its employees would have to meet the test of "compelling governmental interest". This is not to say that a municipality or Civil Service Commission cannot show a "compelling governmental interest", but the burden is upon the municipality or commission to so establish. City employees are performing various duties, as varied as there are departments within the municipality; such as the case of appellee, Agnone, at the Youngstown Airport, operated by the City of Youngstown outside of the city's territorial limits. Water department employees install and maintain water lines that extend into the township and even across county borders. Safety forces perform a unique service to the community. Some of these services may be shown to have "compelling governmental interest" that requires a residency condition with their employment; but, there must be some basis established by facts to arrive at this conclusion. To have been properly established in the instant case, it was necessary that the

appellants establish it by facts that would be evidenced in the record. As the lower court found, there were no such facts established by the appellants as to municipal employees other than what were discussed above relative to policemen.

The record indicates as to the appellee, Carmen Agnone, that his residence out of the city limits is closer to his place of employment at the Youngstown Municipal Airport than if he had lived within the city limits, and there was no evidence of any nature to show the compelling interest of the city in enforcing the residency requirement on this appellee.

We, therefore, find that the City of Youngstown and the Youngstown Civil Service Commission have failed to produce evidence of a "compelling governmental interest" and did not meet their burden to support their claim or requirement of residency of these classified Civil Service employees other than as to policemen after the date of passage of the Civil Service rule, January 20, 1972. We, therefore, sustain appellants' fourth assignment of error as to policemen as discussed hereinbefore and overrule this assignment of error as to appellee, Agnone.

Judgment of the lower court affirmed in part and reversed in part. Final judgment for appellants only as to those portions of assignment of error sustained by this opinion.

O'NEILL, *J.*, Concurs.

LYNCH, *P. J.*, Concurs in part and dissents in part.

APPROVED:

/S/ JOSEPH DONOFRIO
Judge

LYNCH, *P. J.*, Concurring in Part and Dissenting in Part.

I concur with both the reasoning and decision of the majority opinion in the discussion of the defendants' first, second, third and fifth assignments of error. As to defendants' fourth assignment of error I concur in the decision of the majority opinion as to the validity of Youngstown Civil Service Rule IV, Section 5, in its application to policemen who have been hired since January 20, 1972, but dissent as to the adoption of the "compelling governmental interest" standard as a basis for upholding its constitutionality in such application. I further dissent in both the reasoning and decision of the majority opinion as to the enforcement of such rule against employees hired prior to January 20, 1972. I further concur in the decision concerning Carmen Agnone, but dissent as to the reasoning for such decision.

Defendants introduced into evidence Section 32.04 of the Youngstown City Ordinance, which provides as follows:

> "All employees of the city shall reside within the city limits thereof, except temporary employees where the work engaged in may require special skill and expert knowledge. (Ord. 31810-A, Section 1)." (R. 15-16, D. X. 6).

The record does not reveal when Youngstown Ordinance 31810-A was adopted, but defendant in its brief states that it was adopted January 31, 1928. Defendants introduced into evidence the testimony of four policemen, including one who was appointed December 20, 1932, and they were all aware of the requirement of Section 32.04 of the Youngstown City Ordinances that all employees of the city must reside within the city limits (R. 71, 78-80, 87, 94).

In *Angelo Kissos v. City of Youngstown,* Mahoning County Court of Common Pleas Case No. 195308, Judge Sidney Rigelhaupt held that Section 52 of the Youngstown Home Rule Charter vests rule-making power solely and exclusively in the Youngstown Civil Service Commission, and that Section 32.04 of the Youngstown City Ordinances was invalid and unenforceable.

As a result of the above decision the Youngstown Civil Service Commission on January 20, 1972, enacted Rule IV, Section 9 (F), which provides as follows:

> "Any officer or employee not residing within the City limits of Youngstown, except as otherwise provided by Rule IV, Section 5, is subject to dismissal from the service of the City." (R. 3, 18-20, 37, 103-105, 108-110, J. X. 2, J. X. 7, D. X. 10).

The attorneys for both sides indicated that employees of the City of Youngstown living outside of the city limits were given a period of one year to acquire residence within the city (R. 20, 34-35).

Defendants introduced into evidence a copy of Civil Service Rules and Regulations of the City of Youngstown as revised on October 1, 1956. Rule IV applies to applicants for appointment to the classified service, and Section 2 provides in part, as follows:

> "Applicants . . . must have been residents of Youngstown for one (1) year just preceding the date of application, except where the Commission may deem otherwise because of special requirements of the position. * * *." (R. 12-14, J.X. 2, Page 8, D.X. 5, page 7).

The evidence indicates that this rule was in effect since at least 1935. (R. 4, 20, 70, 78, 86, 94, J.X. 3).

Defendant further introduced into evidence the Police Manuals from 1929 to the present time which contain the Rules and Regulations of Police Department of the City of Youngstown. (R. 6-12, D.X. 1, D.X. 2, D.X. 3, D.X. 4).

The record reveals that the Mayor of Youngstown only took action against two City employees, namely, Mr. Carmen Agnone and Mrs. Eileen Bradford, to discharge them because they resided outside of the City limits in violation of Youngstown Civil Service Rule IV, Section 9 (F). Mrs. Eileen Bradford was a policewoman. The action to discharge Mrs. Bradford was rescinded because she complied with the Civil Service Rule. (R. 72-76, 107-108).

However, Mr. Agnone, who was employed as a maintenance man at the Youngstown Municipal Airport, did not comply with Youngstown Civil Service Rule IV, Section 9 (F). He had been employed as a laborer from 1941 to 1951 when he received his civil service appointment to his present position. He had resided in Youngstown until 1959 when he moved to 2990 Belmar, which is located in Liberty Township, Trumbull County. By letter dated January 20, 1973, Mr. Agnone was notified that he was dismissed effective January 23, 1973, because of his failure to comply with Youngstown Civil Service Rule IV, Section 9, Paragraph F. (R. 5-6, 20, 38-44, J.X. 4, J.X. 5, J.X. 6).

Defendants' fourth assignment of error is that the trial court erred in its finding that Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations was void and unconstitutional.

The only pertinent reported Ohio case that has come to my attention is *Quigley v. Blanchester*, 16 Ohio App. 2d 104 (1968), whose syllabus is as follows:

"A municipal ordinance which requires members of the police department to reside in or within two miles of the municipality is a reasonable exercise of the police power of such municipality and is not violative of the Ohio Constitution."

Quigley had been a policeman for some eight years prior to the enactment of the municipal ordinance on residency but was resident some twenty miles outside the village limits. Due to family conditions, he would not comply with the terms of the ordinance. The Court upheld the application of such ordinance to Quigley. In my opinion the facts in the *Quigley* case are identical to the Youngstown employees hired prior to January 20, 1972. Therefore, the decision of the majority opinion in the enforcement of Civil Service Rule IV, Section 5, against employees hired prior to January 20, 1972, is in direct conflict with the *Quigley* case.

On April 21, 1969, the case of *Shapiro v. Thompson*, 394 U. S. 618, which concerned the constitutionality of state statutes requiring all applicants for welfare assistance to have resided within the jurisdiction of such state for at least a year immediately preceding their application for assistance, was decided. The court held such statutes unconstitutional, because such statutes deny equal protection of the laws to such applicants and penalizes such applicant's constitutional right to interstate travel. The court further held that any classification which penalizes the exercise of the constitutional right of interstate travel, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

The *Shapiro* case was followed in *Memorial Hospital v. Maricopa County*, 415 U. S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974), which held that an Arizona statute requiring a year's residence in a county as a condition to an indigent's

receiving non-emergency hospitalization or medical care at the county's expense to be unconstitutional. In the *Memorial Hospital* case, the United States Supreme Court said:

> "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom. Whatever its ultimate scope, however, the right to travel was involved in only a limited sense in Shapiro. The Court was there concerned only with the right to migrate, 'with intent to settle and abide' or, as the Court put it, 'to migrate, resettle, find a new job, and start a new life.' 394 U. S. at 629, 22 L. Ed. 2d 600. Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in Shapiro, the Court explained that '(t)he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites' for assistance and only the latter was held to be unconstitutional. Id., at 636, 22 L. Ed. 2d 600. Later, in invalidating a durational residence requirement for voter registration on the basis of Shapiro, we cautioned that our decision was not intended to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.' Dunn v. Blumnstein, 405 U. S. 330, 342 n 13, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972)." 39 L. Ed. 2d 306 at page 313.

Since the *Shapiro* case and other United States Supreme Court cases following it, several cases concerning state and municipal residency requirements for employment purposes have been reported. There is some conflict between the various cases, but enough cases have been reported to establish a trend.

I agree with the weight of authority which is that municipal ordinances or regulations requiring all municipal

civil service employees to reside within corporate limits of such municipality are constitutionally valid. *Ector v. City of Torrance,* 10 Cal. 3d 129, 109 Cal. Rptr. 849, 514 P. 2d 433 (1973), *cert. den.* 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974); *Abrahams v. Civil Service Commission,* 65 N. J. 61, 319 A. 2d 483 (1974); *Hattiesburg Firefighters Local 184 v. City of Hattiesburg, Mississippi,* 263 So. 2d 767 (1972); *Williams v. Civil Service Commission of Detroit,* 383 Mich. 507, 176 N. W. 2d 593 (1970); *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City,* 22 Utah 2d 115, 449 P. 2d 239 (1969).

Contra to prevailing authorities are *Hanson v. Unified School District No. 500, Wyandotte County, Kansas,* 364 F. Supp. 330 (1973), which held unconstitutional a school district regulation requiring teachers to live within the county in which the school district was located; and *Donnelly v. City of Manchester* (New Hampshire), 274 A. 2d 789 (1971), which held that a municipal ordinance which required all municipal classified employees be or become residents of the municipality was constitutionally invalid as to school teachers.

A group of cases concern the constitutionality of state and municipal laws which give hiring preference to residents for at least one year over residents of less than one year. Cases that held such laws unconstitutional are *Eggert v. City of Seattle,* 81 Wash. 2d 840, 505 P. 2d 801 (1973); *State of Alaska v. Wylie,* 516 P. 2d 142 (1973); and *Carter v. Gallagher,* 337 F. Supp. 626 (1971). Contra is *Town of Milton v. Civil Service Commission,* 312 N. E. 2d 188 (1974), where the Supreme Judicial Court of Massachusetts held such a statute constitutional. Although the Youngstown Civil Service Rules and Regulations has had a similar provision, namely, Article IV, Section 5, formerly Article IV, Section 2, for many years, this question is not an issue in this case.

The leading case at this time appears to be *Ector v. City of Torrance*, 10 Cal. 3d 129, 109 Cal. Rptr. 849, 514 P. 2d 433 (1973), for which the United States Supreme Court denied certiorari 415 U. S. 935, 94 S. Ct. 1451, 39 L. Ed. 2d 493 (1974). The *Ector* case was quoted with approval by *Abrahams v. Civil Service Commission*, 65 N. J. 61, 319 A. 2d 483 (1974).

The *Ector* case cites other cases upholding the constitutionality of municipal employee residence requirements, most of which have been cited already in this opinion, and continues as follows, quoting from 514 P. 2d 433, pages 436-437:

"Among the governmental purposes cited in these decisions or now urged by amici curiae are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress, diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue.

"Appellant contends in the alternative that respondent's residence requirement must be judged by the 'strict' equal protection test, i.e., must be shown to be 'necessary' to promote a 'compelling' governmental interest. To justify invoking the strict standard of scrutiny, appellant proposes a number of 'fundamental rights'

which he asserts are curtailed by the provision in question.

"First it is said that the residence requirement impinges on appellant's 'right to travel.' The contention is not persuasive. Viewed realistically, appellant is claiming the right to 'travel' between his home and his place of employment each morning and evening of each working day—in other words, a 'right to commute.' We cannot discern such a right in the United States Supreme Court decisions relied on by appellant. Clearly the cultural and educational awards of international travel (Kent v. Dulles (1958), 357 U. S. 116, 126-127, 78 S. Ct. 1113, 2 L. Ed. 2d 1204) are not reaped from routine daily trips of a harassed metropolitan commuter. Nor have such trips any relevance whatever to the right to migrate among the several states for the purpose of starting a new life without fear of being denied welfare if a job is not immediately available (Shapiro v. Thompson (1969), 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600), or to the right to move within the confines of a state for the same purpose without fear of being denied prompt access to public housing facilities (King v. New Rochelle Municipal Housing Authority (2d Cir. 1971), 442 F. 2d 646; Cole v. Housing Authority of City of Newport (1st Cir. 1970), 435 F. 2d 807). Each of the latter decisions invalidated not a residence requirement as such but a *durational* residence requirement, i.e., a requirement that the migrant not only be a resident but maintain that status for a certain minimum period of time before he qualifies for benefits. There is no similar 'waiting period' in the provision before us, but simply a requirement of residence in the community in order to be a municipal employee. Nothing in Shapiro or any of its progeny stands for the proposition that an indigent may demand public assistance without

being a bona fide resident of the state or locality to which he has migrated. (See also Dunn v. Blumstein (1972), 405 U. S. 330, 334, 92 S. Ct. 995, 31 L. Ed. 2d 274 (state cannot require unreasonable period of residence as precondition to exercise of right of suffrage, but can require actual residence at time of voting); * * *."

In *Abrahams v. Civil Service Commission*, 65 N. J. 61, 319 A. 2d 483 (1974) the court said as follows in 319 A. 2d 488-489:

"Appellant relies on Krzewinski v. Kugler, 338 F. Supp. 492, 497-498 (D.N.J. 1972) and Donnelly v. City of Manchester, 111 N. H. 50, 274 A. 2d 789 (S. Ct. 1971). Both of these cases are in point, as involving municipal employment residence requirements. Both cite Shapiro as authority for the view that such requirements impair the right to travel. Krzewinski imposed upon the municipality the burden of demonstrating a 'compelling' state interest to justify the impairment but found such an interest to exist (where the residence requirement was as to police officers); Donnelly did not in terms impose the compelling state interest test but rather weighed the 'reasonableness of a restriction upon private rights' against the 'importance of the public benefit' (274 A. 2d, at 791), and found the restriction invalid.

"Both Krzewinski and Donnelly suffer as precedents pertinent here in the light of their failure to appreciate the limited effect of Shapiro, as explicated subsequently in Memorial Hospital, (a) as elevating the right of travel to 'fundamental' status only in respect of the right of migration between states; and (b) as expressly abnegating any hostile view of the validity

of a simple (non-durational) residence requirement in an appropriate case.

"When the thesis of impairment of a 'fundamental' right of travel by a municipal employment residence requisite is seen as stripped of supporting federal constitutional precedent, and it is appraised on its inherent merits, it is found to lack weight. The undeniable general right of people to live near but outside the boundaries of a city in whose government they aspire to be employed is, realistically, not equatable with the right to travel throughout the land vouchsafed by the federal constitution to all United States citizens, Paul v. Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357 (1869); nor even, sensibly conceived, with the right to travel at all, but rather, as bluntly stated in Kennedy, merely the common right to live where one will. The same applies to city employees residing in the city but aspiring to move elsewhere, yet near enough to commute to their city jobs. The 'right' involved is subordinate to a rational municipal policy to restrict employment to residents."

The *Abrahams* case cited *Kennedy v. City of Newark*, 29 N. J. 178, 148 A. 2d 473 (1959), in which the court said as follows at page 476:

"The question is not whether a man is free to live where he will. Rather the question is whether he may live where he wishes and at the same time insist upon employment by government. Cf. McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517 (Sup. Jud. Ct. 1892). If there is a rational basis for a residence requirement in furtherance of the public welfare, the constitutional issue must be resolved in favor of the legislative power to ordain it."

With reference to the members of the Youngstown Police Department, whom plaintiff Fraternal Order of Police Lodge No. 28 represent, all reported cases that have come to our attention hold that municipal ordinances or regulations requiring police officers and firemen to reside within the municipality are constitutionally valid. *Detroit Police Officers Association v. City of Detroit,* 385 Mich. 519, 190 N. W. 2d 97 (1971), appeal dismissed for want of a substantial federal question in 405 U. S. 950 (1972); *Ahern v. Murphy,* 457 F. 2d 363 (1972); *Hattiesburg Firefighters Local 184 v. City of Hattiesburg, Mississippi,* 263 So. 2d 767 (1972); *Krzewinski v. Kugler,* 338 F. Supp. 492 (1972); *Jackson v. Firemen's and Policemen's Civil Service Commission of Galveston,* 466 S. W. 2d 412 (1971); *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City,* 449 P. 2d 239 (1969); *James E. Fugate, et al. v. City of Toledo, et al.,* United States District Court, Northern District of Ohio, Western Division, Case No. C 73-251 (May 14, 1974).

The leading case, at this time, appears to be *Detroit Police Officers Association v. City of Detroit,* 385 Mich. 519, 190 N. W. 2d 97 (1971), which is cited in the majority opinion and for which the United States Supreme Court dismissed the appeal for want of a substantial federal question (405 U. S. 950 (1972)). *Ahern v. Murphy,* 457 F. 2d 363 (1972) followed the *Detroit Police Officers Association* case, and its syllabus is as follows:

> "1. Denial of petition for writ of certiorari by United States Supreme Court carries no precedential weight whatever.
>
> "2. United States Supreme Court's dismissal of appeal for want of substantial federal question is a decision on merits of the case appealed.

"3. United States Supreme Court's dismissal for want of substantial federal question in a state court appeal is fully equivalent to affirmance on merits in an appeal from federal court insofar as federal questions are concerned. 28 U.S.C.A. Section 1257 (1, 2).

"4. United States Supreme Court's dismissal for want of federal question of an appeal from Michigan Supreme Court's decision that ordinance requiring city policemen to reside within corporate boundaries of city did not violate equal protection clause of Fourteenth Amendment was dispositive of later appeal attacking constitutional sufficiency of Chicago ordinance and rule of city police department requiring policemen to reside within corporate boundaries of city of Chicago and the United States Supreme Court's decision was not merely 'persuasive.' 28 U.S.C.A. Section 1257 (1, 2); U.S.C.A. Const. Amend. 14; S.H.A. Ill. ch. 24, Section 3-7-3.1."

In *Hattiesburg Firefighters Local 184 v. City of Hattiesburg, Mississippi*, 263 So. 2d 767 (1972) the court said as follows at page 771:

"We are of the opinion that the ordinance is not an improper classification because the availability of firemen and policemen on short notice directly affects public health and safety in the event of fires, riots or violations of law involving a large number of people. An ordinance requiring such employees to reside within the city has 'some relevance to the purpose for which the classification is made' in that they would more likely be available in the event of an emergency."

In *Krzewinski v. Kugler*, 338 F. Supp. 492 (1972) the court said as follows at pages 499-500:

"The truly important interests to be realized by the residency requirement demand recognition by the Court of the modern pattern of urban disruption and dissipation prevalent today. Rioting and looting have occurred in major New Jersey cities, such as Newark, Paterson, Plainfield and more recently in Camden and Hoboken. A substantial number who have studied the problem attribute much of this lawlessness to a deeply rooted disrespect for an absentee police force which governs by day and resides afar at night. According to the proponents of this view, a policy of requiring fire department and police force residency would tend to increase the presently low degree of community cooperation uniformly observed by law enforcement officials. While this Court would not impute a conscious or deliberate neglect of duty to a policeman or fireman living apart from his municipal employer, we recognize that reasonable men could conclude that a total disengagement between work hours and personal life could detrimentally affect his attitude toward the community and the people he serves. If with each nocturnal escape he manages to leave city problems behind, it may be just a matter of time before the officer develops at least an unconscious disdain for the city and its residents. The mutual advantages of residency required by N. J. S. A. 40:47-5 and similar laws was noted by The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report, The Police (1967).

"Aside from convenience, local residence avoids the impression that the police come from the outside world to impose law and order on the poor and minority groups and also avoids the risk of police isolation from the needs, morals and customs of the community

. . . . .

"Perhaps, more effectively than any amount of training, off duty contact between police and the people they service prevents the stereotyping of police by citizens and of citizens by police . . . .

"Whenever possible, police officers should be encouraged to live within city limits for it is important officers have a feeling of commitment to the city, above and beyond the obligation to police it.

"See also, Governor's Select Committee on Civil Disorders, State of New Jersey, Report for Action 163-164 (1968) (recommending residency as a statewide police requirement); Detroit Police Officers Association v. City of Detroit, 385 Mich. 519, 190 N. W. 2d 97 (1971). Thus, New Jersey has a valid interest in promoting what it has called 'identity with the community' among police and firemen. Mercandante v. City of Paterson, supra, 111 N. J. Super. at 40, 266 A. 2d at 614, citing State v. Benny, 20 N. J. 238, 252, 119 A. 2d 155, 162 (1955).

"Two additional considerations magnify the need for direct community association by these uniformed employees. Residency places the off-duty officer physically within the municipality in which he is authorized to perform his duties. This immediate discharge of duties is not to be confused with the exigencies of quick, emergency recall, for it is not the call from the station house but the chance observations of a neighbor or of the officer himself which will prompt his off-duty actions.

"* * * *

"The added presence of off-duty police in an urban municipality to the on-duty force, even if the off-duty police are rarely called upon to act, will undoubtedly

have a deterrent effect on crime. Additionally, the chance associations and encounters which follow from residence and which may lead to invaluable sources of information will go far towards making each resident policeman a more knowledgeable, qualified officer."

In *James E. Fugate v. City of Toledo,* United States District Court, Northern District of Ohio, Western Division, Case No. C 73-251 (May 14, 1974), the court held that a charter provision of the City of Toledo requiring all employees of the City to be residents therein must be judged against the rational basis test and will be upheld if it bears a rational relationship to a valid state purpose. Pertinent excerpts of the court's opinion are as follows:

"* * * the Court finds that Memorial Hospital v. Maricopa County, 415 U. S. 250, 94 S. Ct. 1076 (1974); Dunn v. Blumstein, 405 U. S. 330 (1972); and Shapiro v. Thompson, 394 U. S. 618 (1969), are not controlling here. These cases all involved application of the compelling interest test to *durational* residency requirements. In each case the Court found that the freedom to migrate among the states had been burdened.

"Where, as here, a local charter provision involving social economic issues is being challenged on Fourteenth Amendment equal protection or due process grounds, the Supreme Court has generally required less exacting judicial scrutiny under the traditional rational basis test. Under this test state legislation will be upheld if it bears a reasonable relation to a valid state purpose. See McGowan v. Maryland, 366 U. S. 420, 425-6 (1961). And as the Court noted in Dandridge v. Williams, 397 U. S. 471, 485 (1970), this test has been applied to state legislation restricting the availability of employment opportunities.

"* * * *

"The City argues that Section 61 and AR-16 are supported by the following reasons:

"1. The availability of police and firemen on short notice is important to public health and safety. Residence within the City helps insure that ready availability.

"2. Police officers are required to be armed at all times and to be immediately prepared to perform their law enforcement duties at any time. The residency requirement helps insure that the City will receive the benefits of this ever vigilant readiness.

"3. Employees who are also City residents feel special motivation toward better performance in their duties than do non-resident employees.

"4. City residence, especially of policemen, tends to help avoid the risk of isolation from the needs and customs of the community and lessens the opportunity for the people to receive the impression that the police commute from the outside world to impose law and order on the poor and minority groups.

"5. Resident employees are more likely than non-residents to have an awareness of the special needs of their employing community.

"6. City employees make decisions daily which directly affect the welfare of the community. By requiring that employees be residents, the rules help to make sure that the employee has a stake in the outcome.

"7. The residency requirement serves partially to insure that the City does not become victim to

'white flight,' whereby white citizens flee to the suburbs in ever-increasing numbers while the city population becomes predominantly non-white. The City's residency requirement is thus an important instrument of a municipal policy which seeks to advance integration of the races within the City."

I agree with the *Ector, Abrahams* and *Fugate* cases that the *Shapiro, Memorial Hospital, Dunn* and similar cases on the constitutionality of state laws which requires a state to show a compelling governmental interest when such laws penalize the constitutional right to interstate travel apply to durational residency requirements. Therefore, they are inapplicable to the simple residency requirement of Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations.

I further agree with the *Ector, Abrahams* and *Fugate* cases that the test to be applied as to the constitutionality of this rule is whether such a rule bears reasonable relation to a valid state purpose.

I would hold that there is a presumption in favor of the constitutionality of this rule and the burden of showing the unconstitutionality of this rule is upon plaintiffs. 10 O Jur 2d, Constitutional Law, Section 151, Page 227, and Section 158, Page 235.

I would find that plaintiffs have not sustained their burden of proof as to the unconstitutionality of this rule either as to its general application or to its specific application to policemen. Therefore, I agree that Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations is constitutionally valid in its specific application to members of the Youngstown Police Department, and that the trial court committed error in holding otherwise.

With reference to the specific application of Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations to plaintiff Carmen Agnone, the facts established by the record must be considered.

Mr. Agnone testified that the Youngstown Airport is located in Trumbull County, approximately twelve miles from downtown Youngstown; that his present address is approximately eight to eight and one-half miles from the Youngstown Airport; that his job requires him to report each and every day to the Youngstown Airport; that he is on call during the time when he is not scheduled to work for any emergency such as a heavy snowfall during the winter months or a plane going off the runway; and that the City of Youngstown owns a residence property on the Youngstown Municipal Airport property in which the former General Foreman, Earl Hopkins, who was under the Classified Service of the City of Youngstown, had resided for eighteen years. When Mr. Hopkins left, Mr. Agnone took over the position of General Foreman and was offered the residence at the Youngstown Airport, but Mr. Agnone refused. The residence is now being rented out to the Beckett Aviation Corporation. Mr. Agnone is sixty years old, and would like to work another year or two before he retired in order to build up his retirement benefits (R. 44-50, 62-63). This testimony was not contradicted by any evidence introduced by defendants; therefore, we have to accept is as factually correct.

I would find from the undisputed facts of this case that the duties of Mr. Agnone's position require him to be readily accessible to the Youngstown Airport even when he is not scheduled to work; that in recognition of this fact Mr. Agnone's immediate predecessor lived on the Youngstown Airport in a residence owned by the City of Youngstown for eighteen years prior to Mr. Agnone's as-

suming the position of General Foreman; that Mr. Agnone was offered the use of the residence at the Youngstown Airport but declined; that Mr. Agnone lives in Trumbull County where the Youngstown Municipal Airport is located and is three and one-half to four miles closer to the Youngstown Airport than he would be if he lived in the center of Youngstown.

I would hold under the facts of this case that the application of Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations by the defendant Mayor of Youngstown to plaintiff, Carmen Agnone, was unreasonable and arbitrary and, therefore, constitutionally invalid. 10 O Jur 2d, Constitutional Law, Section 111, Page 193. Therefore, I agree with the majority decision that such rule cannot be enforced against plaintiff, Carmen Agnone.

Plaintiffs introduced no evidence on the question of specific application of this rule to members of the Youngstown Police Department. The evidence as to Policewoman, Mrs. Eileen Bradford, was elicited from defendants' witness on cross-examination.

I would take judicial notice that the conditions of employment and duties of the members of the Youngstown Police Department are similar to those of the other cities such as Toledo, Ohio; Detroit, Michigan; or Hattiesburg, Mississippi, and that the reasons set out in this opinion from cases arising out of such cities on similar residency requirements as the Youngstown Civil Service Rule are applicable to this case.

Furthermore, Rule 293 of the current Police Manual provides as follows:

> "Rule 293. Members shall devote their entire time and attention to the business of the department

while on active duty. Although certain hours are allotted for the performance of duty, on ordinary occasions, yet at all times they must be prepared to act immediately on notice that their services are required. Members shall always be subject to call when not on active duty." (D. X. 4, Page 37).

The prior Police Manuals had similar provisions (D. X. 3, Rule 2, Page 8; D. X. 2, Rule 2, Page 8; D. X. 1, Rule 3, Page 7).

I would hold that the Youngstown Chief of Police had the power to promulgate Rule 293.

Former Chief of Police, John Terlesky, testified that on several occasions they had to call members of the police department on emergencies, and they appeared within a half-hour (R. 99-100).

The availability of policemen on short notice has been widely recognized as directly affecting public health and safety in the event of riots or violations of law involving a large number of people and as a basis for requiring policemen to reside within a city so that they would be available in the event of an emergency.

The majority opinion held that Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations could not apply to employees hired prior to the enactment of such regulation on January 20, 1972, because, in effect, it would be retroactive in its operation.

The record established that Rule IV, Section 9 (F) of the Youngstown Civil Service Rules does not penalize any employee who lived outside of Youngstown prior to January 20, 1972. Policewoman Mrs. Eileen Bradford apparently lived outside of Youngstown prior to January 20, 1972, but she was not discharged because of this. She was

given one year after January 20, 1972, to move into Youngstown which she did, and she was continued as a policewoman. Therefore, the enforcement of this rule is prospective in its requirement that those employees residing outside of Youngstown must move into Youngstown within one year after its enactment on January 20, 1972.

There is nothing in the amended complaint of plaintiffs or the record of proceedings in this case that indicates that any other member of the Youngstown Police Department, except Mrs. Eileen Bradford, resided outside of Youngstown when Rule IV, Section 9 (F) went into effect on January 20, 1972. Therefore, I assume that all members of the Youngstown Police Department, except Mrs. Eileen Bradford, resided in Youngstown on January 20, 1972. As to those who did reside in Youngstown, the application of Rule IV, Section 9 (F) to them should cause no financial problems. Therefore, in my opinion, there is a serious question whether those policemen who resided in Youngstown on January 20, 1972, have any vested rights that would raise the question of the retroactive application of this rule to them.

The record is silent as to whether Mrs. Eileen Bradford suffered any financial loss or other inconvenience by being forced to move into Youngstown.

The question of the application of municipal residency requirements to employees living outside the municipality at the time such residency requirement was adopted has been considered in a few cases.

In each case that has come to my attention the application of municipal ordinances or regulations requiring employees living outside the municipality at the time such residency requirement was adopted to move inside the

municipality within a reasonable time have been held constitutionally valid against claims that such application was an ex post facto law, or as impairing contracts, or as violating due process. *Quigley v. Blanchester,* 16 Ohio App. 2d 104 (1968); *Hattiesburg Firefighters Local 184, v. City of Hattiesburg, Mississippi,* 263 So. 2d 767 (1972).

In *Salt Lake City Fire Fighters Local 1645 v. Salt Lake City,* 22 Utah 2d 115, 449 P. 2d 239 (1969), the court stated as follows at page 240:

> "It is conceded that there will be cases of hardship and inconvenience for some in order to continue their employment with the City, which is regrettable, but we cannot subscribe to the theory of counsel that place of residence is a God-given, constitutional right, determinable and enforceable by an employee against his employer who offers and gives the employee his job, unless such right contractually is protected."

The record indicates that Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations was no surprise to the members of the Youngstown Police Department.

Youngstown City Ordinance Section 32.04 was in effect during the tenure of all present members of the Youngstown Police Department until declared invalid in the case of *Kissos v. City of Youngstown, supra.* Legally speaking, this ordinance was invalid from its enactment.

However, Rule 280 of the current Police Manual provides as follows:

> "Members shall not violate any of the laws of the United States, State of Ohio, or ordinances of the City of Youngstown." (D. X. 4, Page 36).

The prior Police Manuals had similar provisions. (D. X. 3, Rule 1, Article 6, Page 7; D. X. 2, Rule 1, Article 6, Page 7; D. X. 1, Rule 1, Article 6, Page 6).

I would hold that the Youngstown Chief of Police had the power to promulgate Rule 293.

Thus, members of the Youngstown Police Department were required under Rule 280 of their Police Manual to obey Youngstown City Ordinance 32.04 until it was declared invalid. Our Court has held that it is presumed that policemen perform acts required by law in accordance with the law. *State v. Williams,* 19 Ohio App. 2d 234.

In my opinion Rule IV, Section 9 (F) of the Youngstown Civil Service Rules and Regulations is not an ex post facto law in its requirement that policemen living outside the municipality of Youngstown must move inside Youngstown within one year of the enactment of this rule on January 20, 1972.

APPROVED:

/s/ JOHN J. LYNCH
Presiding Judge

JOURNAL ENTRY OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO

(Dated June 16, 1975)

Case No. 73 C. A. 24

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

FRATERNAL ORDER OF POLICE
YOUNGSTOWN LODGE NO. 28, *et al.*,
Plaintiffs-Appellees,

vs.

JACK C. HUNTER, MAYOR,
CITY OF YOUNGSTOWN, *et al.*,
Defendants-Appellants.

JOURNAL ENTRY

This cause came before this Court of Appeals on the Assignments of Error, briefs, and arguments of counsel relative to the constitutionality and legality of a rule of the Civil Service Commission of the City of Youngstown, Ohio, requiring employees of the City to reside within the city limits. The rule was adopted on January 20, 1972. Relative to the various aspects of this litigation and the Assignments of Error claimed by the Appellants, this Court, for those reasons more fully explained in its Opinion dated April 16, 1975, enters the following orders:

1. The Trial Court holding that the term "officer" in Revised Code 733.68 does not include police officers but

rather denotes elected officials and appointees other than police officers is hereby affirmed;

2. The Trial Court holding that the City of Youngstown Ordinance imposing residency is in conflict with the City Charter and is, thus, invalid is affirmed;

3. The Trial Court holding that the police chief has no power to pass regulations or promulgate orders relative to the administration, supervision, and discipline of the Department of Police is reversed. The extent and limitation of the police chief's power to promulgate rules and regulations is governed by the Charter, state statutes and state statutes governing Civil Service employees;

4. The Fraternal Order of Police, as an association, is a proper party in this litigation and the Trial Court holding to this effect is affirmed;

5. The Trial Court holding that the residency rule adopted by the Civil Service Commission could not be retroactively applied to any city employee entering service before January 1972 is affirmed;

6. The Civil Service Commission residency rule may be constitutionally applied to any policeman hired on or after January 20, 1972, and the Trial Court holding in this regard to the contrary is reversed;

7. The Civil Service Commission rule is unconstitutional relative to Carmen Agnone, and the Trial Court holding to that extent is affirmed;

8. Costs are assessed Appellants.

/s/ JOHN J. LYNCH

/s/ JOSEPH E. O'NEILL

/s/ JOSEPH DONOFRIO

JUDGMENT ENTRIES OF OHIO SUPREME COURT

(September 26, 1975)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

FRATERNAL ORDER OF POLICE
YOUNGSTOWN LODGE NO. 28, *et al.*,
Appellees,

vs.

JACK C. HUNTER, MAYOR,
CITY OF YOUNGSTOWN, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

This cause, here on appeal as of right from the Court of Appeals for Mahoning County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

* * * * *

(Caption as above)

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MAHONING COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER DENYING REHEARING

(October 16, 1975)

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

FRATERNAL ORDER OF POLICE
YOUNGSTOWN LODGE NO. 28, *et al.*,
Appellees,

vs.

JACK C. HUNTER, MAYOR,
CITY OF YOUNGSTOWN, *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

TABLE OF CONTENTS

Page

Constitutional Provisions Involved 2

Questions Presented 2

Counter-Statement of the Case 3

Reasons for Denying the Writ 6

1. The Ohio Courts' resolution of the Fourteenth Amendment challenge to the Youngstown residency rule was narrowly limited to the facts presented, and the case does not present significant constitutional questions or issues of widespread importance 6
2. The resolution by the Ohio Appellate Court of the Fourteenth Amendment challenge to the Youngstown residency rule comports with decisions by this Court 7
3. The conclusion by the court below that the Youngstown residency rule could only be applied to employees hired subsequent to the passage of the rule was based on a provision of the Ohio Constitution and is not properly reviewable by this Court on a writ of certiorari 10

Conclusion 12

TABLE OF AUTHORITIES

Cases

Donnelly v. City of Manchester, 274 A. 2d 789 (N.H. Supreme Ct., 1971) 9

Dunn v. Blumstein, 405 U.S. 330 (1972) 8, 9

Kent v. Dulles, 357 U.S. 116 (1958) 9

Krzewincki v. Kugler, 338 F. Supp. 492 (N.J., 1972) 9

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 11

McGinnis v. Royster, 410 U.S. 263 (1973) 8

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 9

Police Department v. Mosley, 408 U.S. 92 (1972) 8

Shapiro v. Thompson, 394 U.S. 618 (1969) 9

Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972) 7, 10

Younger v. Harris, 401 U.S. 37 (1971) 11

Constitution and Statutes

Constitution of Ohio, Article II, Section 28 .....2, 4, 10, 11

United States Constitution, Article I, Section 10 4

Fourteenth Amendment 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 846

JACK C. HUNTER, Mayor,
CITY OF YOUNGSTOWN, OHIO, et al.,
Petitioners,

vs.

FRATERNAL ORDER OF POLICE,
YOUNGSTOWN LODGE NO. 28, et al.,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Fraternal Order of Police, Youngstown Lodge No. 28 and Carmen Agnone hereby file their opposition to granting the writ of certiorari in the above-captioned matter.

The Opinions below and the basis of this Court's jurisdiction are set out at page 2 of the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions set forth in the Petition at page 3, the following provision of the Ohio Constitution is also involved in this cause.

Article II, Section 28, to the Constitution of the State of Ohio provides:

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

QUESTIONS PRESENTED

1. Should the Supreme Court review the decisions of the Ohio State courts which prohibited the use of a local residency rule as a condition of employment for certain municipal employees when the municipality failed to assert any reasons or offer any evidence that the residency rule furthered an appropriate governmental interest or related to a legitimate state purpose.

2. Whether a determination by a state Appellate Court that a municipal residency rule is violative of a provision of the State Constitution should be reviewed by the United States Supreme Court on a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

On January 20, 1972, the Youngstown Civil Service Commission enacted a rule whereby residency by a municipal employee beyond the Youngstown City limits would constitute grounds for termination of employment. The rule provides:

> "Any officer or employee not residing within the city limits of Youngstown, except as otherwise provided in Rule 4, Section 5 is subject to dismissal from the service of the City."

Among the municipal employees affected by the enactment of the residency rule was Carmen Agnone. In 1959, thirteen (13) years prior to the passage of the residency rule, Respondent Agnone moved from the City of Youngstown to an adjoining suburb. Upon the passage of the residency rule, Petitioner City terminated Mr. Agnone's employment.

This action was then instituted by Carmen Agnone to challenge the City's right to promulgate and enforce a residency requirement. The Fraternal Order of Police, Youngstown Lodge No. 28, representing the Youngstown police force, joined in this cause with Mr. Agnone.

At the hearing in this cause, the evidence established that Carmen Agnone was employed by the City of Youngstown at the Youngstown Municipal Airport. While the Airport is owned by the City, it is located outside the Youngstown City limits, approximately twelve (12) miles from downtown Youngstown. The evidence further reflected that Mr. Agnone's residence, in a suburb of Youngstown, was eight and one-half (8½) miles from the Airport. Consequently, Mr. Agnone was closer to his place of employment and better able to respond to an emergency, if any developed, than had he been a Youngstown resident. At trial the City of Youngstown did not introduce any evidence

in support of its residency rule. It further failed to state the purpose or purposes allegedly served by its rule. The City did not provide any reasons for the rule, and did not assert, much less demonstrate, a nexus between the residency requirement and efficient municipal service.

The Common Pleas Court of Mahoning County, Ohio, held that the validity of the residency rule was dependent upon an examination of the rights affected by the rules and the evidence introduced to demonstrate a valid reason for the requirement. The trial court noted that the rule did infringe on the basic and fundamental Constitutional right of travel. The trial court then observed an absence of any evidence or reason in support of the reasonableness of the rule, and concluded that the residency rule was constitutionally infirm, and could not be applied to any City employee. The Court, upon examining the controlling case law in Ohio, further held that, to apply the rule to civil service employees who joined the service prior to the date the rule was adopted, would be violative of the prohibition against retroactive laws found in Article II, Section 28 of the Ohio Constitution. The Court also expressed the view that such application would be contrary to Article I, Section 10 of the United States Constitution. Accordingly, the trial court held that the residency rule was unconstitutional and void.

An appeal was taken to the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio. The decision of the lower court was reversed in part, and affirmed in part.[1] The Court of Appeals refused to accept the argument that residency rules are per se unconstitutional. Rather, the Appeals Court decided that it would have to consider whether a legitimate governmental interest could be served by the residency rule.

In that light, the Court of Appeals considered the record. The Appellate Court took judicial notice of the functions and duties

[1] Petitioner inaccurately represents that the decision was affirmed on appeal.

of police officers, and concluded that such officers could properly be subject to a residency rule. However, with respect to Carmen Agnone, the Appellate Court affirmed the holding of the lower court. The Court of Appeals reasoned that since Mr. Agnone lived closer to his place of employment than if he lived in the City, application of the residency rule to Mr. Agnone would be patently unreasonable. In so holding, the Court again noted the City's failure to offer evidence or reasons in support of its rule.

Though holding that police officers are subject to the residency rule, the Appellate Court concluded that application of the rule to policemen hired prior to the effective date of the rule would constitute a retroactive application of the law. In so holding, the Appellate Court, consistent with existing Ohio decisional law, concluded that any retroactive application of the rule was incompatible with provisions of the Ohio Constitution. Accordingly, the Court sanctioned the prospective application of the residency rule.

Petitioner, City of Youngstown, sought review in the Supreme Court of Ohio. The Ohio Supreme Court dismissed the claimed appeal by right, denied the City's Motion to Certify the Record, and denied the City's Motion for Rehearing. Petitioner City of Youngstown now seeks review from this Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

1. **The Ohio Courts' Resolution of the Fourteenth Amendment Challenge to the Youngstown Residency Rule Was Narrowly Limited to the Facts Presented, and the Case Does Not Present Significant Constitutional Questions or Issues of Widespread Importance.**

The instant case involves the propriety of the Youngstown residency rule as applied to Youngstown policemen and Carmen Agnone, a former municipal employee assigned to the Youngstown Airport. Petitioner represents that the decision below held that residency rules are violative of the Fourteenth Amendment to the United States Constitution. This is an inaccurate representation of the lower court's holding. The Seventh District Court of Appeals upheld the constitutionality of the rule as applied to Youngstown policemen. The Court of Appeals did hold that the residency rule could not be applied to Carmen Agnone. The Court's conclusion as to Agnone was based on the state of the record which established that his residency was nearer his place of employment than if he lived in Youngstown, and the total failure of the City to introduce any evidence to establish the reasonableness of the rule as applied to Mr. Agnone.

Clearly, despite the pretentions of the City, the Court of Appeals did not frame any broad prohibition on residency rules and did not construe the Fourteenth Amendment as precluding such rules. Indeed, the lower court recognized and upheld the authority of a municipality to enact a proper residency rule. However, upon the state of the record, Plaintiff Agnone was exempted from the operation of the rule. Since the holding below is limited to its peculiar facts, the case does not present a significant issue of widespread importance.

BLEED THROU

2. **The Resolution by the Ohio Appellate Court of the Fourteenth Amendment Challenge to the Youngstown Residency Rule Comports With Decisions by This Court.**

The Youngstown residency rule accords different treatment to individuals who live beyond the City limits. City residents are eligible for municipal employment, while those who reside elsewhere are declared ineligible for positions in the Youngstown Civil Service. Respondents challenged this classification on Equal Protection grounds. The lower courts examined the individual interests affected by the classification and the governmental interests served by the residency rule. Both the mode of review and the ultimate resolution were in conformance with prior decisions of this Court.

In *Weber v. Aetna Casualty and Surety Compnay,* 406 U.S. 164 (1972), this Court explained:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud, 354 US 457, 1 L Ed 2d 1485, 77 S Ct 1344 (1957); Williamson v Lee Optical Co., 348 US 483, 99 L Ed 563, 75 S Ct 461 (1955); Gulf, Colorado & Santa Fe R. Co. v Ellis, 165 US 150, 41 L Ed 666, 17 S Ct 255 (1897); Yick Wo v Hopkins, 118 US 356, 30 L Ed 220, 6 S Ct 1064 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. Brown v Board of Education, 347 US 483, 98 L Ed 873, 74 S Ct 686, 38 ALR 2d 1180 (1954); Harper v Virginia Board of Elections, 383 US 663, 16 L Ed 2d 169, 86 S Ct 1079 (1966). The essential inquiry in all the foregoing cases is, how-

> ever, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" Id at 172, 173.

The lower court conscientiously examined these critical inquiries required by this Court.

With respect to the initial question, "what legitimate state interest does the classification promote?", the lower courts upon consideration of the record correctly acknowledged that the city did not establish any reasonable justification for its residency rule. The City did not explain the purposes served or the policies fostered by a residency requirement. In all Equal Protection cases a legislative classification will only be upheld if some legitimate state interest is established. Thus, as was observed by this Court in *Police Department v. Mosley*, 408 U.S. 92 (1972), at 95:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

In the instant case the City neither asserted nor established such an interest. No nexus between residency in the City and efficient government service was either alleged or demonstrated. The City let the courts devine the purpose of the rule. Yet, the court's function is not to guess legislative motive or speculate on the purpose of an enactment. In *McGinnis v. Royster*, 410 U.S. 263 (1973), this Court stated that, in applying the less exacting rational relation test, the court should "inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." Id. at 270. No such purpose was articulated in the instant cause. In *Dunn v Blumstein*, 405 US 330 (1972), this Court advised consideration of "governmental interests asserted in support of the classification." Id. at 335. No such interest was asserted in the instant cause.

BLEED THROUGH

Despite the total failure of the City to provide adequate justification for the rule, the Court of Appeals did take judicial notice of possible governmental interests served by a residency rule applied to police forces. Given the nature of a policeman's duties, the Appellate Court concluded that there are possible governmental interests served by requiring residency of policemen. Still, with respect to Carmen Agnone, the Appellate Court was not able to conceive of any such purpose.

Thus, the Court did properly address the issue of whether a legitimate purpose was served. Indeed, in its treatment of the issue, and by its willingness to cure the evidentiary defects of Petitioner's case through judicial notice, the Court of Appeals extended to Petitioner City every possible consideration.

The Court of Appeals then directed itself to the second constitutional concern; whether fundamental personal rights were endangered by the residency rule. The Court of Appeals recognized that a residency rule does affect the right of an individual to travel. This Supreme Court has consistently emphasized the constitutional dimensions of this right and has proclaimed the right a fundamental one. See *Kent v. Dullis*, 357 U.S. 116 (1958); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, supra, and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The importance of the right was highlighted by this Supreme Court's utilization of the "compelling state interest test" in determining the constitutional legitimacy of residency rules. *Shapiro v. Thompson*, supra; *Dunn v. Blumstein*, supra; *Memorial Hospital v. Maricopa County*, supra. Accord: *Krzewincki v. Kugler*, 338 F. Supp. 492 (N.J., 1972); *Donnelly v. City of Manchester*, 274 A. 2d 789 (N.H. Supreme Ct., 1971). The lower court applied the same standard in the instant proceeding. Petitioner contends that the Court below erred in following *Shapiro* and requiring the City to demonstrate a compelling state interest.

While we find no merit to Petitioner's argument, the constitutional standard applied is not determinative of the instant case. For Judge Lynch, who concurred in part and dissented in part to the Appellate Court opinion, employed the less exacting reasonable relationship test, urged by the City of Youngstown, and, like the majority, concluded that the rule was valid with respect to police, but was invalid with respect to Carmen Agnone.

Both the interests of the City in requiring the residency of its employees and rights of its employees to live where they choose were examined. The balance struck by the lower court was clearly proper. Though Carmen Agnone was exempted from operation of the rule, the evidence clearly established that no legitimate state purpose could or would be served by requiring him to reside within the City. The analysis and conclusion of the Appellate Court was consistent with prior holdings of this Court. What Petitioner sought, and what the lower court denied, was a blanket authorization to promulgate residency rules irrespective of personal interests affected and of governmental interests served by such a requirement. Such a holding would be clearly contrary to the prior declarations of this Court which require "at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, at 172. Of critical import to the instant cause was the City's failure to assert such a purpose, and, with respect to Carmen Agnone, the court's inability to perceive such a purpose.

3. **The Conclusion by the Court Below That the Youngstown Residency Rule Could Only Be Applied to Employees Hired Subsequent to the Passage of the Rule Was Based on a Provision of the Ohio Constitution and Is Not Properly Reviewable by This Court on a Writ of Certiorari.**

Article II, Section 28 of the Ohio Constitution provides in relevant part:

BLEED THROU

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing obligation of contracts . . ."

The lower courts held that that Constitutional provision precluded application of the instant residency rule to employees hired prior to the promulgation of the rule. In so holding, the Appellate Court relied upon state precedent interpreting the Ohio Constitutional provision. The state Supreme Court denied review.

Since the issue is predicated upon the state court's application of the state constitutional law, review by this Court is clearly not merited. Indeed, the City has not asserted by its Petition that the state courts incorrectly applied state constitutional law.

After dealing with the state issues, the Appellate Court suggested that federal constitutional provisions would likewise preclude application of the residency rule to employees hired prior to the date of the passage of the rule. The court's observation would not support the granting of certiorari. As Justice Frankfurter explained in *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950), among the grounds upon which the United States Supreme Court may deny a writ of certiorari is that

> "[t]he decision may be supportable as a matter of state law, not subject to review by this court, even though the state court also passed on issues of federal law." Id. at 918.

Since the decision rests principally upon state grounds, this Court should deny review. Principles of federalism mandate deference to state courts on state constitutional questions. The underlying reason for such deference was explained by this Court in *Younger v. Harris,* 401 U.S. 37 (1971), where this Court recognized and applied comity, and discussed its principles as follows:

> "the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country

> is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Id. at 44.

To review the considered application by the Ohio courts of state constitutional law would be destructive of traditional notions of federalism and comity and contrary to the explicit mandate of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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